

Brian Johnson, State Bar No. 235965
Josh Voorhees, State Bar No. 241436
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118
brian@chanler.com
josh@chanler.com

Attorneys for Plaintiff
PETER ENGLANDER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

PETER ENGLANDER,

Plaintiff,

v.

BIG TEX TRAILER MANUFACTURING,
INC.; *et al.*,

Defendants.

Case No. CGC-17-562731

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.5 *et seq.*, and
Cal. Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered by plaintiff Peter Englander (“Englander”), and defendants
4 Big Tex Trailer Manufacturing, Inc. (“BTM”) and Carry-On Trailer, Inc. (“COTI” and, collectively
5 with BTM, the “Settling Defendants”) with Englander, BTM, and COTI each individually referred
6 to as a “Party” and collectively as the “Parties.”

7 **1.2 Plaintiff**

8 Englander is an individual residing in California who seeks to promote awareness of exposures
9 to toxic chemicals and to improve human health by reducing or eliminating hazardous substances
10 contained in consumer products.

11 **1.3 Defendants**

12 Englander alleges that each of the Settling Defendants employs ten or more individuals and is
13 a “person in the course of doing business” for purposes of the Safe Drinking Water and Toxic
14 Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Englander alleges that the Settling Defendants manufacture, sell, and distribute for sale in
17 California, vinyl coated cables that contain di(2-ethylhexyl) phthalate (“DEHP”), and that they have
18 done so without first providing the health hazard warning required by Proposition 65. DEHP is listed
19 pursuant to Proposition 65 as a chemical known to cause birth defects or other reproductive harm.

20 **1.5 Product Description**

21 For purposes of this Consent Judgment, “Products” are defined as cables with a vinyl or plastic
22 coating containing DEHP that are sold or distributed for sale in California by Settling Defendants
23 including, but not limited to, the cable component of the *Carry-On Trailer Corporation Breakaway*
24 *Switch, Item No. 139T, UPC No. 6 54102 00139 9*, and those additional products listed as follows: (1)
25 Item No. 6550021; (2) Item No. 6550020; (3) Item No. 6550016; (4) Item No. 6550019; (5) Item No.
26 6550003; and (6) Breakaway Kit #701, UPC# 6 54102 00701 8.

1 **1.6 Notice of Violation**

2 On August 1, 2017, Englander served each of the Settling Defendants, the California Attorney
3 General, and all other requisite public enforcers with a 60-Day Notice of Violation (“Notice”). The
4 Notice alleges that the Settling Defendants violated Proposition 65 by failing to warn its customers and
5 consumers in California of the health risks associated with exposures to DEHP from the Products. No
6 public enforcer has commenced or is diligently prosecuting an action to enforce the violations alleged
7 in the Notice.

8 **1.7 Complaint**

9 On November 28, 2017, Englander filed the instant action (“Complaint”), naming BTM and
10 COTI as defendants, and alleging a single cause of action for the violations that are the subject of the
11 Notice.

12 **1.8 No Admission**

13 Settling Defendants deny the material, factual, and legal allegations contained in the Notice and
14 Complaint, and maintain that all the products that they have sold or distributed for sale in California,
15 including the Products, comply with all laws. Nothing in this Consent Judgment shall be construed as
16 an admission by a Settling Defendant of any fact, finding, conclusion of law, issue of law, or violation
17 of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by
18 Settling Defendants of any fact, finding, conclusion of law, issue of law, or violation of law. This
19 Section shall not, however, diminish or otherwise affect Settling Defendants’ obligations,
20 responsibilities, and duties under this Consent Judgment.

21 **1.9 Jurisdiction**

22 For purposes of this Consent Judgment only, the Parties stipulate that the Court has jurisdiction
23 over Settling Defendants as to the allegations in the Complaint, that venue is proper in the County of
24 San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
25 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

26 **1.10 Effective Date**

27 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
28 Motion for Approval of the Consent Judgment is granted by the Court, including any unopposed

1 tentative ruling granting approval.

2 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

3 **2.1 Commitment to Reformulate Products or Provide Warnings**

4 Commencing on the Effective Date, and continuing thereafter, Settling Defendants agree to
5 only sell or distribute for sale in California either (a) "Reformulated Products," as defined by Section
6 2.2, or (b) Products sold with a clear and reasonable warning pursuant to Section 2.3.

7 **2.2 Reformulated Products Defined**

8 For purposes of this Consent Judgment, Reformulated Products are defined as Products
9 containing a maximum DEHP concentration of 1,000 parts per million (0.1%) when analyzed pursuant
10 to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent
11 methodologies utilized by state or federal agencies to determine DEHP content in a solid substance.

12 **2.3 Clear and Reasonable Warnings**

13 Commencing on the Effective Date, for all Products that do not meet the definition of
14 Reformulated Products established by Section 2.1, Settling Defendants shall provide clear and
15 reasonable warnings in accordance with this Section 2.3 and/or title 27 California Code of Regulations
16 section 25600 et seq., as amended from time to time. Settling Defendants further agree that any
17 warning used will be prominently placed in relation to the Product with such conspicuousness when
18 compared with other words, statements, designs, or devices as to render it likely to be read and
19 understood by an ordinary individual under customary conditions of purchase or use. For purposes of
20 this Consent Judgment, warning for the Products satisfying these criteria that is affixed directly to a
21 Product or its accompanying labeling or packaging sold in California containing the following
22 statement shall be deemed clear and reasonable:



24 **WARNING:** This product can expose you to DEHP, which
25 is known to the State of California to cause
26 cancer and birth defects or other reproductive
harm. For more information go to
www.P65Warnings.ca.gov.

27 If either of the Settling Defendants sells Products via an internet website to customers located in
28 California, the warning requirements of this section shall be satisfied if the foregoing warning appears

1 either: (a) on the same web page on which a Product is displayed and/or described; (b) on the same
2 page as the price for the Product; or (c) on one or more web pages displayed to a purchaser prior to
3 purchase during the checkout process. Alternatively, a symbol consisting of a black exclamation point
4 in a yellow or white equilateral triangle may appear adjacent to or immediately following the display,
5 description, price, or checkout listing of the Product, if the warning statement appears elsewhere on the
6 same web page in a manner that clearly associates it with the product(s) to which the warning applies.

7 **3. MONETARY SETTLEMENT TERMS**

8 **3.1 Civil Penalty Payment**

9 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
10 to in this Consent Judgment, Settling Defendants shall pay \$3,500 in civil penalties. Settling
11 Defendants' civil penalty payment shall be allocated according to Health and Safety Code section
12 25249.12(c)(1) and (d), with seventy-five percent (75%) of the funds paid to the California Office of
13 Environmental Health Hazard Assessment ("OEHHA"), and twenty-five percent (25%) of the funds
14 remitted to Englander. Settling Defendants shall provide its payment in two checks for the following
15 amounts made payable to: (a) "OEHHA" in the amount of \$2,625; and (b) "Peter Englander, Client
16 Trust Account" in the amount of \$875. Englander's counsel shall be responsible for delivering the
17 penalty payment to OEHHA.

18 **3.2 Reimbursement of Attorney's Fees and Costs**

19 The parties acknowledge that Englander and his counsel offered to resolve this dispute without
20 reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the issue to be
21 resolved after the material terms of this Consent Judgment had been settled. Shortly after the other
22 settlement terms had been finalized, the Parties negotiated a reimbursement of the compensation due
23 to Englander and his counsel under general contract principles and the private attorney general doctrine
24 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
25 mutual execution of this Consent Judgment. Accordingly, Settling Defendants agrees to pay \$22,500
26 in a check made payable to "The Chanler Group" for all fees and costs incurred by Englander
27 investigating, bringing this matter to Settling Defendants' attention, litigating and negotiating a
28 settlement in the public interest, and obtaining court approval of the same.

1 **3.3 Payments Held in Trust**

2 All payments due under this Consent Judgment shall be delivered within fifteen (15) days of
3 the date that this Consent Judgment is fully executed by the Parties, and held in trust by Settling
4 Defendants' counsel until the Court grants the motion for approval of this Consent Judgment
5 contemplated by Section 5. Settling Defendants' counsel shall provide Englander's counsel with
6 written notice following its receipt of the settlement funds from Settling Defendants. Thereafter,
7 Settling Defendants' counsel shall hold the funds in trust until, and disburse the payments to
8 Englander's counsel within five (5) days after the Effective Date.

9 **3.4 Payment Address**

10 All payments under this Consent Judgment shall be delivered to:

11 The Chanler Group
12 Attn: Proposition 65 Controller
13 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710

14 **4. CLAIMS COVERED AND RELEASED**

15 **4.1 Englander's Public Release of Proposition 65 Claims**

16 Englander, acting on his own behalf and in the public interest, releases Settling Defendants
17 and their parents, subsidiaries, affiliated entities under common ownership (including, without
18 limitation, American Trailer Works, Inc.), directors, officers, employees, shareholders and attorneys
19 ("Releasees"), and each entity to whom either of the Settling Defendants directly or indirectly
20 distributes or sells the Products including, but not limited to, their downstream distributors,
21 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees
22 ("Downstream Releasees") for any violation arising under Proposition 65 based on a failure to warn
23 about exposures to DEHP in Products manufactured, imported, sold, or distributed for sale by either
24 of the Settling Defendants prior to the Effective Date. Compliance with the terms of this Consent
25 Judgment constitutes compliance with Proposition 65 with respect to the alleged or actual failure to
26 warn about exposures to DEHP in Products manufactured, imported, sold, or distributed for sale by
27 Settling Defendants after the Effective Date.
28

1 **4.2 Englander's Individual Release of Claims**

2 Englander, in his individual capacity only and *not* in his representative capacity, also provides
3 a release to Settling Defendants, Releasees, and Downstream Releasees which shall be effective as a
4 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
5 expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of Englander of any nature,
6 character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
7 actual exposures to DEHP in the Products manufactured, imported, sold, distributed and/or offered for
8 sale or use by Settling Defendants before the Effective Date.

9 **4.3 Settling Defendants' Release of Englander**

10 Settling Defendants, each on its own behalf, and on behalf of its past and current agents,
11 representatives, attorneys, successors, and assignees, hereby waive all claims against Englander, his
12 attorneys, and other representatives, for any action they have taken or statement they have made,
13 whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in
14 this matter, or with respect to the Products.

15 **5. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and shall
17 be null and void if it is not approved and entered within one year after it has been fully executed by the
18 Parties, or by such additional time to which the Parties may agree in writing.

19 **6. ENFORCEMENT OF CONSENT JUDGMENT**

20 **6.1 Only a Party May Enforce the Consent Judgment**

21 Only the Parties may enforce this Consent Judgment. In any action to enforce the terms and
22 conditions of this Consent Judgment, the prevailing party shall be entitled to its reasonable attorneys'
23 fees and costs. Any Party seeking to enforce this Consent Judgment, however, must do so in
24 compliance with this Section 6.

25 **6.2 Notice of Breach and Meet and Confer Requirement**

26 No action to enforce this Consent Judgment may be commenced or maintained, and no Notice
27 of Violation related to the Products may be served or filed against either of the Settling Defendants by
28 Englander, unless Englander first provides the Settling Defendant(s) with written notice, indicating the

1 specific acts alleged to breach this Consent Judgment ("Notice of Breach"). Any Notice of Breach
2 must contain (a) the name of the product, (b) the date(s) on which the Product was sold, purchased, or
3 witnessed as being available for sale or purchase, (c) the name and address for the seller of the Product
4 Englander believes violates the Consent Judgment, (d) images of the Products with all packaging and
5 labeling, including any model, SKU (stock keeping unit), item, or batch number visible on the Product
6 labeling; (e) copies of any test results tending to show that a Product sold without a warning is not a
7 "Reformulated Product" as defined by Section 2.2, and (f) any other evidence supporting or tending to
8 support the allegations in the Notice of Breach.

9 **6.3 Right to Cure Violations Alleged in Notice of Breach**

10 Within thirty (30) days of receiving a Notice of Breach from Englander, a Settling Defendant
11 shall either (1) send the store, or other seller location where the accused Product is offered for sale, a
12 letter directing that the Product be immediately removed from inventory and returned to Settling
13 Defendants at Settling Defendants' expense; (2) provide the seller with warning materials in
14 compliance with Section 2.3 to be applied to any Products remaining in the seller's inventory, or (3)
15 refute the information provided in Englander's Notice of Breach by meeting and conferring with
16 Englander for not less than forty-five (45) days in an effort to resolve the alleged breach informally to
17 Englander's reasonable satisfaction.

18 Englander shall agree a violation alleged in a Notice of Breach has been resolved to his
19 reasonable satisfaction, and take no subsequent action to enforce against the Settling Defendant(s), if
20 the Settling Defendant(s) (a) directs the store to remove the offending product from its inventory as
21 described above within forty-five (45) days of receiving a Notice of Breach from Englander; or (b)
22 provides the store or other seller with warnings for the Products in compliance with Section 2.3, above,
23 and, thereafter, verifies with the store that such warnings have been, or are being, provided to
24 consumers in California. If the Settling Defendant(s) cures the alleged breach by complying with either
25 (a) or (b) above, then Englander shall not pursue further enforcement of the alleged breach of the
26 Consent Judgment.

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1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

2 This Consent Judgment may be executed in counterparts and by facsimile or portable document
3 format (PDF) signature, each of which shall be deemed an original, and all of which, when taken
4 together, shall constitute one and the same document.

5 **10. POST-EXECUTION ACTIVITIES**

6 Englander agrees to comply with the reporting form requirements referenced in Health and
7 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
8 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of this Consent
9 Judgment, which Englander shall draft and file and Settling Defendants shall support, including
10 appearing at the hearing if so required.

11 **11. MODIFICATION; DUTY TO MEET AND CONFER**

12 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
13 entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any
14 Party, and the entry of a modified consent judgment by the Court.

15 **12. AUTHORIZATION**

16 The undersigned are authorized to execute this Consent Judgment and have read, understand,
17 and agree to all the terms and conditions contained herein.

18 **AGREED TO:**

18 **AGREED TO:**

19 Date: _____

19 Date: 12/19/12

20 By: _____

20 By: 

21 PETER ENGLANDER

21 Steve Courreges, President
22 BIG TEX TRAILER MANUFACTURING,
23 INC.

23 **AGREED TO:**

24 Date: _____

25 By: _____

26 Dana M. Goff, President
27 CARRY-ON TRAILER, INC.
28

This Consent Judgment may be executed in counterparts and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

Englander agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of this Consent Judgment, which Englander shall draft and file and Settling Defendants shall support, including appearing at the hearing if so required.

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any Party, and the entry of a modified consent judgment by the Court.

The undersigned are authorized to execute this Consent Judgment and have read, understand, and agree to all the terms and conditions contained herein.

AGREED TO:

Date: _____

By: _____

Steve Courreges, President
BIG TEX TRAILER MANUFACTURING,
INC.

Date: 12/21/2017

By: Dana M. Goff, President
CARRY-ON TRAILER, INC.